Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

No. 96-309

In The

Supreme Court of the United States

October Term, 1995

FAIRWAY FOODS, INC. and HENKEL CORPORATION,

Petitioners,

v.

STATE OF MINNESOTA AND JAMES L. GIRARD, IN HIS CAPACITY AS COMMISSIONER OF REVENUE,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

BARRY R. GRELLER*
Assistant Attorney General
GREGORY P. HUWE
Assistant Attorney General
Tax Litigation Division
10 River Park Plaza
St. Paul, Minnesota 55146-0600
(612) 296-0982

Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

QUESTION PRESENTED

Whether the Minnesota Supreme Court correctly held that Petitioners had failed to prove that the Minnesota Alternative Minimum Tax on Corporations (AMT) violated the Commerce Clause "internal consistency" test when they failed to show that they – or any actual taxpayer – would be subject to additional tax burdens even if all states imposed the identical tax.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 8

I. THE ISSUE IN THIS CASE IS OF LIMITED SIGNIFICANCE SINCE THE MINNESOTA TAX HAS BEEN REPEALED, NO OTHER STATE HAS ADOPTED OR IS LIKELY TO ADOPT A SIMILAR TAX, AND NO TAXPAYER HAS BEEN SHOWN TO HAVE BEEN EVEN POTENTIALLY HARMED BY THE TAX 9

II. PETITIONERS FAILED TO MEET EITHER THE COURT'S OR THEIR OWN TEST FOR A "VIOLATION" OF THE INTERNAL CONSISTENCY REQUIREMENT UNDER THE COMMERCE CLAUSE, WHICH WAS CORRECTLY APPLIED BY THE MINNESOTA SUPREME COURT 16

A. Petitioners' Proposed Test, And Not The Decision Of The Minnesota Supreme Court, Blurs The Internal Consistency Requirement 17

B. Even If Petitioners' Hypothetical Corporation Is Assumed To Exist, The Minnesota AMT Does Not Violate The Internal Consistency Test 21

CONCLUSION 27

TABLE OF AUTHORITIES

Page

FEDERAL DECISIONS:

Amerada Hess Corp. v. Director, Division of Taxation, 490 U.S. 66 (1989) 25

American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) 10

Armco, Inc. v. Hardesty, 467 U.S. 638 (1984) 9, 11, 12, 25

Associated Industries of Missouri v. Lohman, 511 U.S. ___, 114 S. Ct. 1815 (1994) 19

Barringer v. Griffes, 1 F.3d 1331 (2d Cir. 1993) 13

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 1, 8, 22

Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983) 2, 9, 20

Goldberg v. Sweet, 488 U.S. 252 (1989) 10

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 22, 24

National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) 16

Oklahoma Tax Commission v. Jefferson Lines, Inc., 514 U.S. ___, 115 S. Ct. 1331 (1995) ..... *passim*

Quill Corporation v. North Dakota, 504 U.S. 298 (1992) 16

Sprint Communications Company v. Kelly, 642 A.2d 106 (D.C. Cir.), *cert. denied*, 115 S. Ct. 294 (1994) 12

Trinova Corp. v. Michigan Department of Treasury, 498 U.S. 358 (1991) 10

TABLE OF AUTHORITIES – Continued

Page

Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. 232 (1987) 10, 12

United States v. Salerno, 481 U.S. 739 (1987) 12

MINNESOTA DECISIONS:

In re Alternative Minimum Tax Refund Cases, 546 N.W.2d 285 (Minn. 1996) ..... *passim*

DECISIONS OF OTHER JURISDICTIONS:

Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994) 13

General Motors Corporation v. City of Los Angeles, 35 Cal. App. 4th 1736, 42 Cal. Rptr. 2d 430 (1995) 12

MINNESOTA STATUTES:

Minn. Stat. § 290.02 (Supp. 1987) 1

Minn. Stat. § 290.06 (Supp. 1987) 3

Minn. Stat. § 290.06, subd. 21 (Supp. 1987) 23

Minn. Stat. § 290.092 (Supp. 1987) 1, 3

Minn. Stat. § 290.092, subd. 1 (Supp. 1987) 3

Minn. Stat. § 290.092, subd. 5 (Supp. 1987) 3

Minn. Stat. § 290.0921 (1994) 14

Minn. Stat. § 290.171 (1986) 22

Minn. Stat. § 290.19 (1986) 21

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents State of Minnesota and the Commissioner of Revenue respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court (Pet. App. 1a-14a) is reported as *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 285 (Minn. 1996). The opinion of the Minnesota district court is reproduced in the appendix to the petition at pages 15a-39a.

STATEMENT OF THE CASE

This case is a constitutional challenge to Minnesota tax statutes imposing an alternative minimum franchise tax on corporations (the "AMT") for the years 1987 through 1989.[1] Minn. Stat. §§ 290.02, 290.092 (Supp. 1987). The only issue on appeal is whether the AMT violates the "internal consistency" standard under the fair apportionment prong of the four-part test for whether state tax laws violate the Commerce Clause.[2]

---

[1] For purposes of this litigation, 1987 was chosen as the "test year" by stipulation of the parties.

[2] Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a state tax is valid under the Commerce Clause if it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. *Id.* at 279.

The internal consistency requirement was first articulated by the court in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983) as follows:

> Having determined that a certain set of activities constitute a "unitary business," a State must then apply a formula apportioning the income of that business within and without the State. Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair. The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency – that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business income being taxed.

Id. at 169 (citations omitted).

Although first applied to apportionment formulas, the internal consistency requirement has since been used in a variety of state tax cases, always to determine "the logical consequences of cloning" a particular state's taxes. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, ___, 115 S. Ct. 1331, 1338 (1995). As the Court recently stated, "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.*

As in effect during the 1987-89 period, the AMT imposed a tax of 1/10 of 1% on the sum of a corporation's three Minnesota business factors of sales, property and

payroll, without regard to its "income" or profits.[3] The tax was payable by corporations whose alternative minimum tax liabilities exceeded their income-based regular corporate franchise tax liabilities.

The AMT was computed under Minn. Stat. § 290.092, subd. 1 (Supp. 1987), which read:

> For taxable years beginning after December 31, 1986, and before January 1, 1990, in addition to the taxes computed under this chapter without regard to this section, the franchise tax imposed on corporations includes a tax equal to the excess, if any, of:
>
> (1) .001 multiplied by the alternative minimum tax base, over
>
> (2) the amount of tax computed under this chapter without regard to this section.

The "alternative minimum tax base" referred to in the statute was the sum of the same property, payroll and sales factors corporate taxpayers used to apportion their income to Minnesota for their regular franchise tax.

The regular income-based franchise tax, computed under Minn. Stat. § 290.06 (Supp. 1987), and the AMT interacted, with the net effect that corporations paid the higher of their AMT tax base multiplied by .1 percent, or their regular franchise tax. Looked at in another way, this interaction between the two taxes may be described as

---

[3] The factors-based AMT was repealed for tax years after 1989 and replaced with a tax which piggy-backed on the federal alternative minimum tax for corporations. Minn. Stat. § 290.092, subd. 5 (Supp. 1987) (Pet. App. 44a). The replacement tax is not being challenged in this proceeding.

imposing both the regular franchise tax and a flat .1% "factors tax" on corporations, with a credit for payment of the regular franchise tax against the factors-based tax.

Either way, it is the combined effect of the two taxes that Petitioners challenge in their claim under the Commerce Clause. Neither tax, considered alone, is objectionable. Neither tax is imposed on income earned or assets located outside the State of Minnesota. Neither tax distinguishes between corporations doing business entirely within Minnesota and those doing business within and outside the state. As Petitioners have candidly conceded, there is no Commerce Clause issue if *both* taxes are imposed with no credit for payment of one against the other. Pet. at 17.

Before adoption of the AMT in 1987, the Minnesota Department of Revenue estimated that only approximately one-half of all corporations doing business in Minnesota and subject to taxation paid any corporate franchise tax in any given year. Prior to 1987, the Minnesota corporate franchise tax was imposed at a rate of 12% of taxable income, one of the highest corporate tax rates in the nation. Because of its sensitivity to the economic cycle and because of its structure, the pre-1987 Minnesota corporate franchise tax was one of the most, if not the most, volatile taxes imposed by Minnesota. Revenues were extremely unpredictable both in amount and availability. Pet. App. 24a.

In 1987, the Minnesota franchise tax was substantially amended. The 1987 amendments were the result of a statewide study by a blue-ribbon panel appointed by the Governor. The study proposed major tax reforms

including, *inter alia*, a reduction in the corporate franchise tax rate from 12% to 8.9%, the adoption of a minimum tax on business activities within the state, the elimination of net operating loss carry-backs, repeal of the arithmetic apportionment option, and conformance to federal corporate tax amendments. Pet. App. 25a.

The 1987 changes were intended to expand the corporate tax base, to add fairness by increasing the number of corporations paying business taxes, to simplify the corporate tax, to generate additional revenues, to add stability and predictability to the corporate tax revenues, to reduce the burden on highly-taxed businesses, and to remove Minnesota from the highest ranking corporate tax rate states. Pet. App. 25a.

The AMT proposed by the study was conceived of as a tax on business activity occurring in Minnesota, as measured by three factors: Minnesota property, Minnesota payroll, and Minnesota sales. These factors were used because they were broad, neutral measures of business activity, readily available, and easy to use. The three factors recommended as the AMT tax base were also chosen because they were neutral, indifferent to profit, did not penalize profitable corporations, and taxed corporations on a fair and equitable basis. Pet. App. 25a-26a. A major premise behind the adoption of the AMT was that income alone was not the best basis for taxing business, because it is only one measure of activity and because it discriminates against businesses that are profitable. Pet. App. 26a.

Beginning in 1989, over 100 tax refund actions were filed in Minnesota district court by business corporations

seeking refunds of corporate franchise taxes for the years 1987 through 1989, when the factors-based AMT was in effect. The cases were consolidated for trial by the district court on the basis of the claims of three representative plaintiffs: Fairway Foods, Inc., Henkel Corporation, and Juba's, Inc.[4]

Prior to trial, the parties entered into an extensive Stipulation of Facts. In addition, a three-day trial was held at which a variety of expert witness testimony, deposition testimony and documentary evidence was introduced.

The facts relating to the two remaining plaintiffs, who are the Petitioners here, are set forth in the trial court's findings of fact, reproduced at Pet. App. 16a-18a (Henkel Corporation) and 21a-24a (Fairway Foods, Inc.). At trial, the only evidence submitted by the Petitioners concerning the alleged Commerce Clause violation here at issue was the testimony of Petitioners' expert witness, a mathematics professor. For purposes of his testimony, the expert was given a definition of when a "violation" of internal consistency occurs by Petitioners' counsel. Pet. App. 69a. The mathematician did not claim to have any legal expertise and admitted that this definition of a violation of internal consistency expressed only his

---

[4] The three "test plaintiffs" were chosen by agreement of the parties. Juba's, Inc. has not joined in the petition, presumably because it does business solely within Minnesota and thus has no standing to raise a Commerce Clause claim, which is the only claim remaining in this case out of fourteen counts originally included in the Consolidated Complaint. As discussed below, there is also a serious question whether either of the Petitioners could show a violation of the Commerce Clause. They have not done so to date. See *infra* Part II, note 14.

understanding of what Petitioners' counsel had told him. T. 218.

Using mathematical theories and a hypothetical taxpayer (X Corporation), Petitioners' expert sought to demonstrate that, depending on the corporation's income level and structure of apportionment factors, the sum of the corporation's AMT and regular franchise tax liabilities in each of the states in which it does business (assuming that each state had in effect the same tax law as Minnesota) could under certain circumstances exceed the corporation's total tax liability if all its property, payroll, and income were instead concentrated in a single state. Pet. App. 69a. It was clear from the expert's testimony, however, that for any given structure of apportionment factors (payroll, property and sales in each state where it does business), this result would obtain only within a limited range of taxable income levels. Any taxable income above or below this "interval of violation," as Petitioners' expert called it, produces no difference in total tax burdens and no "violation" as defined by the professor. Pet. App. 70a. Significantly, no evidence or testimony was offered as to whether the taxable income of any of the three representative plaintiffs – or indeed that of any plaintiff in the 100 pending cases – fell within this "interval" during any of the relevant years. In fact, no evidence was offered as to what the interval would have been for any of the plaintiff corporations.

The trial court concluded that "[t]he imposition of the AMT on plaintiffs does not constitute an unlawful burden on interstate commerce in violation of the rights guaranteed plaintiffs by the Commerce Clause of the United States Constitution." Pet. App. 30a. On appeal, the

Minnesota Supreme Court affirmed this conclusion. *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 285 (Minn. 1996). Pet. App. 1a. The Minnesota Supreme Court based its decision in part on the uncontroverted fact that Petitioners had failed to show that any existing taxpayer would experience tax results similar to the hypothetical X Corporation, even if all 50 states imposed the same tax as Minnesota. Pet. App. 10a. Under Petitioners' own proposed test, therefore, no violation of internal consistency has been shown to have occurred. Pet. App. 70a, 77a.[5]

REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The decision of the Minnesota Supreme Court is neither contrary to the decisions of this Court nor those of any other state court of last resort. This case demonstrates no need for the Court to clarify the principle of internal consistency under the four-part test for violations of the Commence Clause established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Nor is the question presented by the facts in this case likely to recur. Among the states, Minnesota was alone in adopting a factors-based AMT, which has since been repealed. As

[5] During oral argument, Justice Gardebring of the Minnesota Supreme Court analogized this failure to prove a violation to a lack of standing on the part of the Petitioners. Indeed, because of its income level, Petitioner Henkel Corporation could not possibly have shown that it was similarly situated to X Corporation, and Petitioner Fairway Foods, Inc. did not even try to do so. See *infra* Part II, note 14.

Petitioners admit, no other state has adopted, or shown an inclination to adopt, a similar tax. There is, therefore, no compelling need for the Court to resolve a conflict among the lower courts or provide additional guidance to the states. Finally, Petitioners have failed to show that any actual taxpayer was harmed by the tax. Petitioners do not, therefore, meet their own test for a "violation" of the internal consistency requirement. Finally, even if Petitioners' hypothetical corporation is assumed to exist, the Minnesota tax does not violate the Court's internal consistency test.

I. THE ISSUE IN THIS CASE IS OF LIMITED SIGNIFICANCE SINCE THE MINNESOTA TAX HAS BEEN REPEALED, NO OTHER STATE HAS ADOPTED OR IS LIKELY TO ADOPT A SIMILAR TAX, AND NO TAXPAYER HAS BEEN SHOWN TO HAVE BEEN EVEN POTENTIALLY HARMED BY THE TAX.

Petitioners urge the Court to grant the petition on the grounds that the question decided by the Minnesota court is a "recurring issue of profound national significance," (Pet. at 14) and that the decision will "preclude the simple application of the bright-line internal consistency test." (Pet. at 18-19). In fact, the petition does not meet any of the criteria for granting a petition for a writ of certiorari set forth in Rule 10 of the Rules of this Court.

The internal consistency test, first articulated by the Court in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983), has been referred to or applied by the Court on a number of occasions and in a variety of contexts. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (wholesale gross receipts tax imposed on

non-domiciliary corporations while exempting local manufacturers wholesaling in the state violates internal consistency test); *Tyler Pipe Industries, Inc. v. Washington Department of Revenue,* 483 U.S. 232 (1987) (state business and occupations tax which treated goods manufactured elsewhere less favorably than those manufactured within the taxing state violates internal consistency test); *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266 (1987) (unapportioned axle tax subjecting interstate truckers entering Pennsylvania to higher per mile costs of operation than purely intrastate truckers violates internal consistency). *See also Trinova Corp. v. Michigan Department of Treasury,* 498 U.S. 358, 385 (1991) (referring to internal and external consistency tests as expressing the fair apportionment requirement of the Commerce Clause); *Goldberg v. Sweet,* 488 U.S. 252, 261 (1989) (reiterating the internal consistency test as an aspect of fair apportionment); *Oklahoma Tax Commission v. Jefferson Lines,* 514 U.S. ___, ___, 115 S. Ct. 1331, 1338 (1995) (no failure of internal consistency results from a tax on sales of tickets for bus travel imposed by the state where travel originates). Thus, there is no lack of guidance to the state courts in this area of the law.

In its decision, the Minnesota Supreme Court correctly articulated and applied the internal consistency test, referring to this Court's most recent restatement of the standard as follows:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of

> the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

In re Alternative Minimum Tax Refund Cases, 546 N.W.2d at 289-90, *quoting Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. at ___, 115 S. Ct. at 1338 (1995). Pet. App. 8a.

It is not true, as Petitioners assert, that the Minnesota Supreme Court's decision "creates an additional burden of proof to show that the actual plaintiff in the case is in fact *presently adversely affected* by the lack of internal consistency without providing any 'precise guides' as to exactly how a taxpayer is supposed to satisfy this additional burden of proof." Pet. at 19 (emphasis added). To the contrary, the Minnesota court stated. "[Petitioners] correctly observe that the internal consistency test involves the hypothetical imposition of the tax by every state." *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290, Pet. App. at 9a. What troubled the Minnesota court was that Petitioners offered no evidence that any actual taxpayer would be negatively impacted by the AMT *even assuming the imposition of an identical tax by every state in the union.*[6]

---

[6] Unlike the West Virginia Tax Commissioner in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), neither the Minnesota Commissioner nor the Minnesota Supreme Court has suggested

The issue Petitioners ask this Court to address is whether, in order to prove that a state tax is facially invalid under the internal consistency test, it is sufficient merely to show that it is possible to conceive of a set of circumstances in which an interstate business would have a higher total tax burden than it would have if its entire business were concentrated in a single state.[7] As explained below, Petitioners' own test thus goes beyond the initial hypothetical cloning of the tax in issue, and requires a detailed analysis of a specific taxpayer's structure of apportionment factors and level of income before it can be determined whether a "violation," as Petitioners' mathematics expert defined it, can occur.[8] It was

---

that Petitioners must "prove actual discriminatory impact on [themselves] by pointing to a state that imposes a [similar] tax that results in a total burden higher than that imposed on [their] competitors in [the taxing state]." *Id.* at 644. Rather, it is the Petitioners' failure to demonstrate (or even allege) that any actual taxpayer would be subject to additional tax burdens, even when the existence of identical tax structures in other jurisdictions is assumed, that is so conspicuous in this case.

[7] Petitioners would thus turn on its head the well-settled proposition that a challenger attacking the facial validity of a legislative act must establish that *no* set of circumstances exists under which the act is valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (non-tax case).

[8] The lower court decisions cited by Petitioners (Pet. at 23) do not conflict with the decision in this case because they involved plaintiffs who were demonstrably victims of actual discrimination. *General Motors Corporation v. City of Los Angeles*, 35 Cal. App. 4th 1736, 42 Cal. Rptr. 2d 430 (1995), is little more than a clone of *Armco* and *Tyler Pipe*, the only difference being that the taxing jurisdiction was a city rather than a state. In *Sprint Communications Company v. Kelly*, 642 A.2d 106 (D.C. Cir.), *cert. denied*, 115 S. Ct. 294 (1994), the court applied the internal

this extra step, not required by the decisions of this Court, but of Petitioners' own devising, that the Minnesota court refused to take.

Even if the Court believes that the Minnesota court erred and incorrectly applied the internal consistency test in this case, there is no compelling reason to grant the petition. If Petitioners were correct that the internal consistency test requires the examination not only of the logical consequences of cloning a state tax, but of the financial structure of hypothetical taxpayers as well, this

---

consistency test to invalidate a taxing scheme which, if applied by every state, would have inevitably resulted in higher taxes on interstate telecommunications carriers. In *Sprint*, the Commerce Clause violation arose from the fact that the affected taxpayers would have paid taxes in other states *on the same tax base* which triggered the District of Columbia's gross receipts tax. The unavoidable threat of multiple tax burdens on the same tax base likewise underlies the decisions in *Barringer v. Griffes*, 1 F.3d 1331 (2d Cir. 1993) and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994). Both cases involved taxation of motor vehicles. In *Barringer*, Vermont imposed a 5% use tax on autos using the state's highways. In *Kuhnlein*, Florida imposed an "impact fee" of $259 on all title certificates issued in the state. In each case, it was absolutely clear that *any* motor vehicle licensed and operating in more than one state during its lifetime (including those owned by the plaintiffs) would be subject to multiple tax burdens if all states were to impose the same fees or taxes. Unlike the cases cited by Petitioners, however, in this case the threat of multiple taxation of an actual taxpayer cannot be demonstrated, even if it is assumed that all states impose an identical tax. Neither the regular franchise tax, which is apportioned, nor the factors-based AMT tax, which is imposed solely on a taxpayer's Minnesota-based payroll, property and sales, exposes the same tax base to a risk of multiple taxation by other states. That no other court has addressed the issue raised in this case indicates that it is either insignificant or not ripe for resolution by the Court.

case would present, at most, the possible misapplication of a properly stated rule of law.[9]

Moreover, the issue in this case is one which is not likely to recur. As Petitioners point out, only Minnesota, among the 50 states, has ever imposed a factors-based alternative minimum tax on corporations. Pet. at 6. As noted by the Minnesota Supreme Court, this form of tax was in effect only from 1987 to 1989, and was replaced by a corporate alternative minimum tax based on the federal tax code. Minn. Stat. § 290.0921 (1994). *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 287, Pet. App. 3a. The issue in this case is therefore hardly one of profound national significance, requiring resolution by this court.[10]

Furthermore, no manifest injustice resulted from the limited, three-year imposition of this tax, such that this Court should grant the petition to provide relief to unidentified injured taxpayers.[11] No taxpayer was shown to

---

[9] As Rule 10 states, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

[10] If the Court wishes to consider whether geographically limited non-refundable state tax credits discriminate against interstate commerce, a case involving widely-implemented credits (job credits or research and development credits, for example) which affect a large number of actual taxpayers would present a more appropriate opportunity for review. In the courts below, Petitioners raised a separate claim of discrimination against interstate commerce based on the non-refundable credit aspect of the tax (Pet. App. 10a), but they have abandoned it here. See *infra*, notes 17-18 and accompanying text.

[11] Remedial issues were not addressed by the trial court or the Minnesota Supreme Court. Since the matter was bifurcated

have been negatively impacted by the AMT, even when it is assumed that every state imposed the same tax as Minnesota. In fact, the evidence showed that it would take an unusual combination of circumstances for a "violation," as Petitioners defined it, to occur. *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290, n.2, Pet. App. at 10a n.2.

There is no discriminatory purpose or intent apparent in the Minnesota AMT law, which is facially neutral. The tax base and very low tax rate of .1% were the same for every corporate taxpayer doing business and subject to taxation in Minnesota. Nor was the tax directed specifically at economic activity occurring only at a particular location. As Petitioners' argument reveals, whatever theoretical disadvantage the tax might impose on certain companies is the result of their profitability, the structure of their apportionment factors, and the fact that their business activities are subject to taxation in more than one jurisdiction, and is not the logical consequence of cloning the tax.

In light of the fact that no facial discrimination against interstate commerce has occurred, no actual taxpayer has been shown to be harmed, and no similar tax is in effect in any state, including Minnesota, there is no compelling reason for this Court to grant the petition.

---

as to liability and remedy, and because Respondents prevailed below, only the liability phase of the trial was conducted.

II. PETITIONERS FAILED TO MEET EITHER THE COURT'S OR THEIR OWN TEST FOR A "VIOLATION" OF THE INTERNAL CONSISTENCY REQUIREMENT UNDER THE COMMERCE CLAUSE, WHICH WAS CORRECTLY APPLIED BY THE MINNESOTA SUPREME COURT.

Petitioners argue that the decision of the Minnesota Supreme Court incorrectly "blurs" the "bright-line" internal consistency test under the Commerce Clause and turns it into a "quagmire." Pet. at 15, 19. Even if this were true, Petitioners' argument is beside the point, as are the cases on which they rely. Whatever the benefits of "bright-line" tests might be, none of the cases cited by Petitioners in Part I of their petition, at pp. 15-18, involved a serious challenge to a state tax on internal consistency grounds.[12]

---

[12] *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), were sales tax cases which focused on the nexus requirements under both the Due Process Clause and Commerce Clause. The bright-line standard established in those cases had nothing to do with internal consistency. Instead, *National Bellas Hess* and *Quill* established and reaffirmed, respectively, the physical presence nexus requirement for determining whether a state may constitutionally compel a vendor to collect the state's use tax. Likewise *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, 115 S. Ct. 1331 (1995), while referring briefly to the internal consistency standard, disposed of it in two sentences. 514 U.S. at ___, 115 S. Ct. at 1338. The balance of the opinion in *Jefferson Lines* is concerned with the issue of "external consistency," which, in the Court's words, "looks not to the logical consequences of cloning, but to the economic justification of the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to

The Minnesota court properly articulated the internal consistency test in its decision, citing *Container* and *Goldberg* and quoting the Court's most recent explanation of the test in *Jefferson Lines. In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 285, 289-90 (1996), Pet. App. 7a-8a. In applying the test, the Minnesota court correctly recognized that the test requires the theoretical assumption that every state imposes the same tax. *Id.* at 290, Pet. App. at 9a.

As the Minnesota court noted, however, Petitioners' proposed test requires that additional assumptions be made about the financial circumstances of a hypothetical taxpayer. If there is a "quagmire" here, it is of Petitioners' own making. Instead of the "bright-line" standard they claim to support, Petitioners propose a tax requiring the Court to examine not only the structure of the tax, but also the financial circumstances of *specific taxpayers* in order to determine whether a "violation" of internal consistency, as they have defined it, occurs. The Minnesota court wisely declined the invitation to become mired in that swamp, as should this Court.

A. Petitioners' Proposed Test, And Not The Decision Of The Minnesota Supreme Court, Blurs The Internal Consistency Requirement.

Petitioners' definition of a "violation of internal consistency" is set forth in the report of Petitioners' mathematics expert. Pet. App. 69a. The test proposed by

---

economic activity within the taxing state." *Id.* (citations omitted). Petitioners, in their hypothetical mathematical challenge, do not question the external consistency of the Minnesota tax.

Petitioners' expert requires examination of a particular hypothetical taxpayer's liabilities in each state where it does business, assuming a tax law identical to Minnesota's is in effect in each state. As the expert's testimony makes clear, there can be no "violation" (as Petitioners defined it) except within a narrow range of possible incomes which might be assumed for a fictional corporation. Pet. App. 70a.

Thus, as Petitioners' expert formulated the test, no violation of internal consistency occurs unless a particular corporation's income falls within a certain range, relative to the structure (*i.e.*, size and distribution) of its apportionment factors. This range is not constant, but varies according to the financial circumstances of each imaginary taxpayer.[13]

It is uncontroverted that Petitioners presented no evidence that they, or any actual taxpayer, would have had a higher total tax liability, assuming tax laws identical to Minnesota's were in effect in all states, than if their businesses were concentrated in a single state.[14] Thus,

---

[13] In the case of his hypothetical X Corporation, the range of incomes Petitioners' expert claimed to be within his "zone of violation" was quite limited, from $206,384 on the low end to $1,819,257 on the high end. Pet. App. 77a. Even at the high end of this range, however, X Corporation's return on investment would be a very low (and highly unusual) 3.1%. *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290 n.2. Pet. App. 10a n.2.

[14] As to the three representative plaintiffs below, only Fairway Foods, Inc. would have been a possible candidate for such proof. Juba's Inc., which has not joined in the petition, operates entirely within Minnesota, and thus has no Commerce Clause claim. Henkel Corporation had no federal or Minnesota

Petitioners failed to show that they have met even their own test for when a violation of internal consistency occurs. Rather, Petitioners asserted that they should not be required to show a violation as they had defined it. Petitioners argued that instead they should be required to show only the theoretical possibility that some fictional interstate company might have a higher total tax liability than it would have if its business were concentrated in a single state. As the Minnesota court pointed out, "according to [Petitioners], once a *potential* variation is established between interstate and intrastate tax liability, the tax scheme violates the internal consistency test under the Commerce Clause and therefore must be struck down." *In re Alternative Minimum Tax Refund Cases*, 546 N.W. 2d at 290 (Minn. 1996) (emphasis in original); Pet. App. 9a.

This Court has stated, however, that the mere possibility of unequal treatment does not justify invalidating a tax on Commerce Clause grounds. In *Associated Industries of Missouri v. Lohman*, 511 U.S. ___, ___, 114 S. Ct. 1815, 1824 (1994), the Court observed:

---

taxable income during the 1987 tax year in question. Thus Henkel would have been subject to the factors-based AMT in every state in which it does business if tax laws identical to Minnesota's were in effect in all 50 states, and the most it would owe is the .1% AMT on 100% of its factors. Under these circumstances, no "violation" would have occurred, according to Petitioners' expert. Pet. App. 70a. As far as Fairway Foods is concerned, Petitioners simply made no attempt to show that it would have been subject to higher tax burdens on an interstate basis if a tax identical to Minnesota's was in effect in all 50 states.

> But we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands. On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in "effect," *see, e.g., Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263, 270, 104 S. Ct. 3049, 3054, 82 L.Ed.2d 200 (1984), and we have emphasized that "equality for the purposes of . . . the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton*, 373 U.S., at 70, 83 S. Ct. at 1204. *See also Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481, 52 S. Ct. 631, 635, 76 L.Ed. 1243 (1932) ("Discrimnination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries").

In this case there has been no showing of discrimination in "effect," even when it is assumed that all states impose the identical tax. In the absence of such a showing, Petitioners cannot prevail in their claim that the tax is unfairly apportioned because it lacks internal consistency. Furthermore, having also failed to meet a test they themselves urged on the trial court, it ill behooves Petitioners now to complain that the Minnesota Supreme Court imposed the wrong test.[15]

---

[15] Petitioners' attempt to make much of the fact that the trial court cited language from *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169-70, requiring "clear and cogent" evidence of malapportionment. Pet. 7-8. Petitioners state that the trial court "misread" *Container*, because the "clear and cogent" language appears in the context of a discussion of the external consistency aspect of fair apportionment. This is a

B. Even If Petitioners' Hypothetical Corporation Is Assumed To Exist, The Minnesota AMT Does Not Violate The Internal Consistency Test.

Even if Petitioners' hypothetical corporation is assumed to exist, the additional tax burden shown in the example they used does not result from a lack of internal consistency.

As Respondents' expert economics witness established at trial, the additional tax burden which Petitioners' claim befalls their hypothetical taxpayer arises from factors not addressed in the internal consistency cases cited by Petitioners, including the weighted sales factor in Minnesota's apportionment formula, and the non-refundable credit for regular franchise taxes. T. 267-74.

With respect to the apportionment factors, Respondents' expert testified that an increased total tax burden on certain corporations resulted from Minnesota's adoption, at the same time the factors-based AMT was introduced, of a mandatory weighted apportionment formula.[16] T. 273-74. Petitioners do not challenge the

---

red herring. As the Minnesota Supreme Court observed, "The parties in this case agree that the internal consistency test was correctly summarized by the district court in this case." *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290, Pet. App. at 8a.

[16] Prior to 1987, Minnesota used either an unweighted, three-factor formula or a sales-weighted formula (70% sales, 15% payroll and 15% property), whichever resulted in the lower percentage of income apportioned to Minnesota. Minn. Stat. § 290.19 (1986). Taxpayers whose income was subject to

weighted apportionment formula as inherently unfair. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978) (upholding Iowa's single-factor apportionment formula which used only sales).

Respondents' expert also showed that *any* state taxing system which includes non-refundable credits "violates" internal consistency as Petitioners have defined it. T. 270-71. His testimony in this regard is uncontroverted.[17] Both weighted apportionment formulas and non-refundable credits are extremely common among state corporate tax schemes. Minnesota is not unusual in having these features in its tax system. For example, Respondents' expert identified 29 states that provide tax credits to corporations for creating jobs and increasing employment in the taxing state. T. 267, 274. If the Minnesota AMT violates internal consistency because it interacts with the regular franchise tax as though the franchise tax is a non-refundable credit, then so does any tax system which includes such credits, including the business tax systems of Minnesota and many other states.[18]

---

apportionment also had the option of electing a third method under the Multistate Tax Compact. Minn. Stat. § 290.171 (1986).

[17] The factors-based AMT and the Minnesota regular franchise tax interact as though the taxpayer receives a credit for its regular franchise tax liability, if any, against its AMT. As a result, the taxpayer pays the higher of the two taxes. Findings F.2, F.3, Pet. App. 29a; Conclusions 1.C, Pet. App. 33a.

[18] This case would be a poor vehicle for deciding whether non-refundable credits discriminate against interstate commerce. Such credits are more appropriately analyzed under the discrimination prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), not the fair apportionment prong (of which internal consistency is an aspect). See *supra* note 10.

Provision of a credit for any regular franchise tax liability against the AMT should not be construed as creating a constitutional problem where none would otherwise exist. There are sound public policy reasons why the Minnesota Legislature chose to provide the credit for regular franchise taxes. One of the goals of the AMT was to provide some degree of relief to profitable corporations by leveling the tax burden and lowering the overall tax rate. The Legislature could simply have added the AMT on top of the regular franchise tax, but this would have increased the existing tax burden on the most profitable taxpayers who were already paying the majority of corporate taxes. Instead, the Minnesota Legislature reasonably chose to impose the factors-based AMT as an alternative tax in order to achieve its goals of enhanced revenues, reduced volatility and a broadened tax base.[19]

This is not a case where "one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, ___, 115 S.Ct. 1331, 1338 (1995). The potential for an increased tax burden, if any, resulting from the Minnesota AMT arises from factors outside the purview of the internal consistency test. Just as "sales with at least partial performance

---

[19] The Minnesota Legislature provided for a five-year carryforward of a credit for any AMT paid against future franchise tax liabilities, so that taxpayers which achieved higher levels of taxable income in subsequent years could take advantage of previously paid AMT taxes. Minn. Stat. § 290.06, subd. 21 (Supp. 1987). For many corporations, this carryforward feature substantially reduced or eliminated any AMT liability (over and above their regular franchise tax liability) over time.

in the taxing state justify that state's taxation of the transaction's entire gross receipts in the hands of the seller," *id.* at 1340, so the presence of a taxpayer's payroll, property or sales in Minnesota justifies Minnesota's taxation of those bases at any reasonable level without regard to whether another state might tax the taxpayer's property, payroll or sales located in *that* state.

As Petitioners' expert acknowledged, there can be no "violation" of internal consistency (as Petitioners have defined it) unless at least one state imposes the factors-based alternative minimum tax and at least one other state imposes the income-based franchise tax on the same taxpayer. Pet. at 11 n.3. This risk of a higher total tax bill on corporations doing business across state lines is always present, however, and has nothing to do with internal consistency. The risk Petitioners complain of arises from the fact that different states may impose their taxes on different tax bases without violating the Constitution. As this Court has stated,

> The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the "accidental incident of interstate commerce being subject to two different taxing jurisdictions." Lockhart 75; *See Moorman Mfg. Co.*, 437 U.S., at 277.

Jefferson Lines, 514 U.S. at ___, 115 S. Ct. at 1342 (footnote omitted).

The higher tax burden in Petitioners' hypothetical example does not arise from improperly apportioned taxes, but from the fact that a taxpayer operating entirely within one state is subject only to that state's taxes, while

the multistate corporation may be exposed to more than one type of tax. The Minnesota AMT is, in effect, two separate taxes, only one of which would be imposed on a particular taxpayer in any given year by each state imposing such a tax.[20]

The situation in this case is analogous to *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66 (1989). In *Amerada Hess*, the taxpayer, an oil producer, challenged certain "add back" provisions of New Jersey's

---

[20] In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court noted that the out-of-state taxpayer would also have a higher total tax burden than a manufacturer located entirely within the taxing state, if the out-of-state taxpayer's "home" state imposed a tax only on manufacturing, while West Virginia imposed a tax only on wholesaling. The Court stated:

> In that situation, Armco would bear two taxes, while West Virginia sellers would bear only one. But such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business. What we said in *Boston Stock Exchange*, 429 U.S. at 336-337, 97 S. Ct. at 610, is relevant here as well:
>
> > Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

Armco, 467 U.S. at 645-46.

business corporation tax which denied crude oil producers a state tax deduction for federal windfall profits taxes paid. The Court rejected the claim that the add-back provision discriminated against oil producers who marketed oil in favor of independent retailers who were not involved in oil production, an entirely out-of-state activity. The Court stated that "whatever disadvantage this deduction denial might impose on integrated oil companies does not constitute discrimination against interstate commerce. . . . Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities." *Id.* at 78.

In this case, whatever differences in effect the combination of the Minnesota corporate franchise tax and the factors-based alternative minimum tax may have had on various taxpayers results from differences in their profitability and their exposure to multiple taxing jurisdictions. In the absence of any facial discrimination against interstate commerce, or any demonstrated actual violation of the internal consistency requirement, the Minnesota Supreme Court reasonably concluded that no constitutional violation had been proven. Where no actual taxpayer has been shown to have been harmed by the tax – even when it is assumed that every state imposed the identical tax – no federal issue justifying further review by this Court has been raised.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

BARRY R. GRELLER
Assistant Attorney General
Counsel of Record

GREGORY P. HUWE
Assistant Attorney General

Tax Litigation Division
10 River Park Plaza
St. Paul, Minnesota 55146-0600
(612) 296-0982

Counsel for Respondents

Dated: September, 1996.